No. 12512

In The United States
Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD AND ALFRED J. PETERSON,

Appellants,

v.

ALASKA PACKERS ASSOCIATION,

Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court, Territory of Alaska, First Division

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STATEMENT OF JURISDICTION

This proceeding is brought under the provisions of the Alaska Workmen's Compensation Act, (Title 43-3-1, et seq. 1949 Compiled Laws of Alaska.)

The appellant Alfred J. Peterson, having sustained accidental injuries arising out of and in the course of his employment by appellee Alaska Packers Association, filed an application for compensation with the Alaska Industrial Board, the authority which administers the Alaska Workmen's Compensation Act. Upon a hearing having been had on said application, the Industrial Board, on March 10, 1949, renderd its decision and awarded Peterson $1,517.76 as for temporary and $3,450.00 as for permanent disability compensation. The employer Alaska Packers Association appealed from the Board's decision to the District Court for the First Division of the Territory of Alaska; the District Court reversed the Board and held that the facts presented bring the case within admiralty jurisdiction and that the Alaska Workmen's Compensation Act is inapplicable. From the decision of the District Court the appellant Peterson and the Alaska Industrial Board appeal to this Court.

STATEMENT OF FACTS

The facts in this case are simple and uncontradicted. The appellee Alaska Packers Association operates a salmon canning plant at Naknek in Bristol Bay, Alaska; at the time appellant Peterson sustained the accidental injuries complained of he was in appellee's employ as a deckhand on a small power boat locally known as a "Monkey boat" of nine tons net; this boat

was used by the canning company to service and tow its fishing boats to and from the fishing grounds at the mouth of the Naknek River, in Bristol Bay to its stationary receiving station anchored at the mouth of the said river. On July 10, 1947 while depositing a sack of coal on the galley floor of the "Rail" which Peterson had carried from the bow to the stern of the boat he sustained the accidental injuries complained of.

The monkey boat was a small vessel of nine tons net, called the "Rail."

POINTS PRESENTED AND URGED

On this appeal appellants raise but one point: Did the Alaska Industrial Board err when it awarded compensation to the appellant Peterson pursuant to the Alaska Workmen's Compensation Act, for accidental injuries sustained by him arising out of and in the course of his employment by appellee as a deckhand on its small power boat used by it in connection with its cannery operations in Bristol Bay, Alaska?

ARGUMENT

The appellants rely upon two propositions to sustain their claim that the Alaska Workmen's Compensation Act rather than the general maritime law is applicable to the facts here presented.

These two propositions are:

First: Because the work in which Peterson was engaged at the time he sustained the accidental injuries was of such purely local nature, character and concern that the application of the local statute to it will not work any material prejudice to any characteristic fea-

ture of the general maritime law or interefere with the proper harmony and uniformity of that law in its international or interstate relation;

Second: The place where and the nature of the work performed on the small vessel upon which Peterson was employed at the time he sustained the injuries was of such equivocal nature and character that the case may well be deemed to fall within the purview of either the local or federal statute and that the selection of the forum by Peterson is determinative of this issue.

APPELLANTS' FIRST CONTENTION

As indicated, Peterson was employed as a deckhand in connection with the operation of the Alaska Packers' small power boat, locally known as a "Monkey" boat. It is the work of a monkey boat to tow fishing boats, propelled by oars and sails only, from the shore cannery or moored fish receiving scow to the fishing grounds and return them with their catch of fish, to the receiving scow or cannery where the fish are processed. The work performed by the monkey boat consists exclusively in assisting in the efficient operation of the canning process; it expedites this work and is merely incidental thereto. To bring the fish to the canning plant as quickly as circumstances will permit is the sole purpose of operating such a boat; it was not engaged in any independent effort but used as a mere adjunct to the expeditious execution of the enterprise in which the employer was engaged when the injuries were sustained. There is, in principle, no difference

between the facts here presented and those appearing in the case of:

Alaska Packers Association v. Marshall, 95 Fed. (2) 279,

decided by this Honorable Court in 1938. In that case Marshall and a fellow fisherman, employed by the Alaska Packers Association, encountering heavy weather while fishing in the same waters in which Peterson was operating, were drowned. This Court, speaking by Justice Denman states:

> "When the details of the contract of employment are considered the local character of this gathering of the cannery's raw material is clearly seen as a mere incident in the canning process."

Hence the local statute became applicable to the case.

A few years after the rendering of the aforesaid decision, the question was again presented for determination by this Court:

Olsen v. Alaska Packers Association, 114 Fed. (2) 364.

However, the facts in the latter case were somewhat different from those in the Marshall case and for this difference, this Court held contrary to what it had done in the Marshall case.

In the Olsen case it appeared that the seaman Olsen was struck by a load of frozen beef being lowered from the ocean steamer "Etolin" to a launch lying in the navigable waters of Bristol Bay, and Olsen sought to recover damages in admiralty as for negligence. The lower court dismissed the libel holding that its allegations did not establish maritime jurisdiction. This Court reversed, holdng the allegations sufficient for that purpose and directing to proceed in admiralty. In

the latter case an attempt was made to bring it within the decision in the Marshall case referred to above.

In its opinion the Court distinguishes between the two cases in this language:

> *"In this case, (the Olsen case) the sailor was injured in loading frozen beef. There is no allegation concerning the ownership of or the purpose to which it was to be put, and there is no showing of any kind that it was to be used in canning. It may well have belonged to and been carried for some third party as a supply for a purpose entirely apart from the Company's salmon canning. There is a general allegation that the work for which the libelant was employed by respondent was to participate in the canning operations and that the employment of the libelant at said cannery was local in character and said employment of libelant (i.e. what he was to participate in) was part of the canning operations."*

Speaking about the work the libelant was to "participate in" this Court said:

> *"The fact that the work which libelant was to 'participate in' was in canning operations, does not negative the fact that at the time he was injured he was employed in other than in canning; loading a cargo of beef from another vessel on a launch in the open sea—35 miles from land for some unknown purpose is a maritime employment and not shown to be anything else."*

We venture the assertion that if it had been shown in the Olsen case that the frozen beef which struck him was the property of his employer, the cannery operator; that it had been shipped from the States to Bristol Bay for the sole and exclusive use of the employer to provide his employees, including Olsen, with food; that the employer's employees were customarily required to unload this food and that Olsen was required,

like other employees, to transport it from the ocean carrier to the cannery messhouse on shore, this Court would have held as it did in the Marshall case, namely, that Olsen's employment, though maritime in character, was of a purely local nature, incidental and necessary to the sole business of the cannery operator and therefore controlled by the local statute.

In the case at bar Peterson was working in his employer's small boat; this boat and the work it was required to perform was solely to assist in the expeditious delivery of the raw material used by the cannery; Peterson's work and service was as essential as securing it and his work, together with that of the fishermen and the people actually doing the canning was all incidental to the successful operation of their employer's business. The Peterson situation was very different from that of Olsen; as far as the record shows, there was no connection between the latter's services and his employer's canning operations; for all that appears in that case Olsen was engaged in a venture separate and apart from his employer's cannery work.

It is well settled now that if an injury occurs in navigable waters in the performance of a maritime contract the case falls within the exclusive jurisdiction of admiralty unless, (a) the contract is of mere local concern; (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the local statute would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or

uniformity of that law in its international or interstate relations.

This is the doctrine laid down in:

Southern Pacific Co. v. Jensen, 244 U.S. 205,

and reinforced and expounded in:

Millers' Indemnity Underwriters v. Braud, 275 U.S. 50.

In the latter case the Court considered the Texas Workmen's Compensation Act in its relation to a diver who died in the navigable waters of the Sabine River, because of the lack of sufficient air supply while at work. The insurance carrier claimed that the claim arose out of a maritime tort and that its obligations were fixed by the maritime law. This contention was rejected by the Supreme Court in the following language:

> "The record discloses facts sufficient to show a maritime tort to which the general maritime jurisdiction would extend save for the provision of the state compensation act; but the matter is of mere local concern and its regulations by the state will work no material prejudice to any characteristic feature of the general maritime law."

See also:

Grant Smith Porter Co. v. Rhode, 257 U.S. 469.

The latest opinion upon the maritime but local doctrine, appears in the case of:

Maryland Casualty Co. v. Toups, 172 Fed. (2) 542.

In that case the Circuit Court of Appeals for the 5th Circuit states:

> "Toups was both captain and crew of the 46 foot vessel, Relief No. 1, of the Sabine Pilot Asso-

ciation. That Association was engaged in supplying pilots to seagoing vessels that came into and out of the Port of Arthur, Texas, and in furtherance of its business maintained and operated docks and shore installations. Toups was not one of the pilots of large seagoing ships but only of Relief No. 1 with which he took pilots out to ships when they came in and brought them back when their pilotage was ended. In addition to navigating and keeping up the Relief No. 1, Toups at times served as an engineer on the larger vessels. On the day on which he was drowned, he, under order from his employer, was on the Association's small dock and was engaged in making fenders to be used as cushions to protect his vessel against buffeting between the wharves and the big ships when it was required to get between them. While thus employed, from an unknown cause, Toups was precipitated into the water and drowned."

The Maryland Casualty Company had issued workmen's compensation insurance for Sabine Pilots. After investigation the Insurance Company made one insurance payment to the widow of Toups and then concluded that Toups was engaged in maritime employment cognizable only by Federal Statute and stopped making further payments; and sought to set aside an award made by the Industrial Accident Board of Texas under the local Workmen's Compensation Act; it undertook to defend on the ground that the employment and the work of Toups was doing were maritime, that the locality of his death was wholly within navigable waters of the United States.

Upon judgment going against it, the Insurance Company appealed, on the ground (among others not material here) that the Court had no jurisdiction under the Workmen's Compensation Act.

The Appellate Court held:

> "In the present case the employment of the deceased was maritime in its nature as the captain and the crew of the Relief No. 1. The work in which he was engaged at the time of his death was likewise maritime. The dock upon which he was working extended out into navigable waters and his death occurred in navigable waters."

The Court then refers to the Jensen and other decisions of the Supreme Court dealing with the maritime but local doctrine and then continues:

> "The deceased, no doubt, was a seamen on a vessel engaged in navigation and in aid of navigation whose heirs, in the absence of an applicable State Workmen's Compensation Act, would be remitted to the Jones Act for redress, but since an action under the Jones Act must ground upon negligence, and since in the present case no negligence of the employer can be shown, the heirs would be without remedy under that Act or in Admiralty. Such a result is not imperative unless the invocation of the State Act would '*interfere with the proper harmony or uniformity of that law* (*admiralty*) *in its international or interstate relations.* No inharmonious result is here possible. The deceased, at the time of his death was working upon the dock making fenders for the use of his boat. He hauled no interstate or foreign commerce. Neither his vessel nor his work affected the intricate relations that involve the ship, crew, master, owner, cargo, shipper, consignee or responsibility or lack of it under the law of the sea. Neither the activity of the deceased nor the method of compensation agreed upon for his family could have interfered with the proper harmony or uniformity of the law that preails, and should prevail, in all substantial relations arising out of maritime commerce, whether interstate or international. We conclude that the lower court was not without jurisdiction

to apply the Texas Workmen's Compensation Act to the facts in the present case."

"A State may bring within operation of its Workmen's Compensation laws men employed in handling logs in navigable waters in connection with placing them in booms and conducting them to sawmills."

"It is settled that where the employment, although maritime in character pertain to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not materially prejudice the characteristic feature of the general maritime law or interfere with its uniformity."

Eclipse Mill Co. (Sultan) v. Department of Labor 277 U.S. 132.

In *Eldredge v. Weidler*, 81 N.Y.S. (2) 58

The facts were as follows: Claimant's decedent was directed by his employer to go to the assistance of his yacht in view of an oncoming hurricane. The decedent, carrying out these instructions took a rowboat and proceeded to the yacht some short distance offshore. He was drowned. Recovery was had under the local statute. The Court says: "It cannot be gainsaid that his mission was maritime; but the factual situation was so purely local, isolated and transitory that it is difficult to see where, in a real and true sense, it had any substantial connection with navigation or commerce."

Should this Honorable Court find it impossible to agree with the foregoing views, we respectfully request consideration of Appellants' "Second Contention" which is:

APPELLANTS' SECOND CONTENTION

Appellants claim that the nature of the work performed by Peterson and the small vessel and place where it was performed were of such equivocal nature and character as to justify the conclusion that under the decisions of the highest courts of the land, the facts here presented bring the case within what has been designated as the "Twilight Zone", i.e. that it may logically be deemed to be cognizable in either jurisdiction and that the election of the forum by the injured employee determines the jurisdictional issue.

Great difficulty has been experienced in determining whether a particular case falls within the federal or local domain.

Says the Supreme Court of the United States in:

Davis v. Department of Labor, 317 U.S. 249:

> "This Court had held that the margin of state authority must be determined in view of surrounding circumstances as cases arise, * * * * the determination of particular cases of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."
>
> "The line separating the scope of the two, being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."
>
> "There is in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

The Supreme Judicial Court of Massachusetts has made an attempt to expound the twilight zone doctrine announced in the Davis case in:

Moores's Case, 80 N.E. (2) 478. The Court says:

> "The decision in the Davis case lies in its obvious attempt to set up a means of escape from the difficulties in drawing a line between State and Federal authority under the doctrine of the Jensen case. The decision does not overrule the Jensen case but it does create a twilight zone or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. Mr. Justice Frankfurter says that 'theoretic illogic is inevitable so long as the employee is permitted to recover at his choice under either act.'
>
> "We regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and designed to include within a wide circle of doubt all water cases pertaining both to the land and the sea where a reasonable argument can be made either way even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other."

In determining whether a state of facts falls on one side or the other a determining factor must be ascertained. True, as stated by our learned District Judge, to date the Supreme Court of the United States has not clearly indicated what that factor may be. The concept of local character may be it; but whether this be so or not, it seems reasonably clear from the interpretation several courts have accorded the Davis decision, that "maritime but local doctrine" continues to play an important part in resolving the difficult question.

Our learned District Judge, in his opinion, lays great stress upon the decision in *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, as controlling the situation here. In that case the widow of the drowned employee

commenced her proceedings under the Longshoremen's Act, the employer contending that the local statute was applicable.

In referring to this decision the Supreme Court in the Davis v. Department of Labor case states:

> "There is, in the light of the case referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act."
>
> "Faced with this problem we must give great—indeed presumtive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves . . . . Fact findings of the agency, when supported by the evidence, are made final. The conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales, supra.*"
>
> "In the instant case we must look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute."
>
> "The benefit of a presumption is also given in cases of conflict of state or state and territorial

workmen's compensation acts under the Full Faith and Credit Clause . . . . "

"Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under the Longshoremen's Act. Under all the circumstances we will rely on the presumption of constitutionality in favor of this state enactment . . . ." "The Constitution is no obstacle to the petitioner's recovery." (under the local statute.)

It is respectfully suggested that the judgment herein should be reversed.

Respectfully submitted:

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